No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY (a corporation), ROCHESTER GERMAN INSURANCE COMPANY (a corporation), CALEDONIAN AMERICAN INSURANCE COMPANY (a corporation) and SCOTTISH UNDERWRITERS (a corporation),

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR to Defendant in Error's Answer to Supplemental Brief.

T. C. Van Ness,
Otto Irving Wise,
Attorneys for Plaintiffs in Error

Filed this *day of December, 1915.*

FRANK D. MONCKTON, *Clerk.*

By ..... *Deputy Clerk.*

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REPLY OF PLAINTIFFS IN ERROR

to Defendant in Error's Answer to Supplemental Brief.

Pursuant to permission granted, this brief is filed in reply to the answer of defendant in error to the supplemental brief of plaintiffs in error. We desire to call the Court's attention to certain matters which we believe conclusively answer the position taken by defendant in error that plaintiffs in error cannot be heard on the merits.

Defendant in error has cited, in the above referred to answering brief, a number of cases tending to support the general rule that, in the absence of an agreed statement of facts, this Court, on a writ of error, will not hear the case on its merits unless the record shows special findings or a motion for a nonsuit.

Without, in detail, going into the facts upon which those cases were decided, we respectfully submit that the present case is clearly distinguishable from them in this: that in those cases there was but one appeal on records which, in most instances, showed a conflict. The writ of error upon which the present appeal is prosecuted is the second writ of error taken out in this same case. The present case has been tried twice, or, rather tried once and submitted for judgment once. Subsequent to the first trial a writ of error was taken to this Court and it was held as a matter of law that there was no question of fact for determination either by a jury or by the Court, holding that the question to be determined was one of law.

The case now comes to this Court upon a second writ of error upon practically the same record with the slight immaterial change in the testimony to which attention has already been called, and which in no way created a conflict. Therefore, the case here, upon practically the same record as on the first appeal, is in a clearly different status from the cases referred to by defendant in error for the reason that the law of the case was fixed upon the

former writ of error when this Court held that there was no question of fact to be determined.

For defendant in error to say that the record does show the transcript of the evidence taken upon the former trial, we have but to call the Court's attention to the transcript, page 68, folio six, where the following language occurs:

> "The following is the substance of the evidence at the former trial".

In addition to the foregoing, we respectfully submit that if this Court should be of the opinion that the submission of the case was not a request for judgment and that the submission under the circumstances outlined was not an agreed statement certainly there is absolutely no answer to the further fact that the record shows in the prayer to the answer (Tr. p. 22, fol. 27) that plaintiffs in error below expressly prayed that defendant in error take nothing by the action and that plaintiffs in error have judgment for their costs of suit. We respectfully submit that a request for judgment contained in such a prayer is of just as much force and has the same legal effect as if such request were made at the submission of the case to the trial Court and that the Court's decision in rendering judgment contrary to such a request can be reviewed.

Dated, San Francisco,
December 24, 1915.

Respectfully submitted,

T. C. Van Ness,
Otto Irving Wise,
Attorneys for Plaintiffs in Error.